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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

## No. 449

ROBERT M. BRAKE,

*Petitioner,*

vs.

DON SHOEMAKER, THE MIAMI HERALD PUBLISHING COMPANY, a Florida corporation, and FRED SHERMAN,

*Respondents.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### INTRODUCTION

Throughout this brief, we will refer to the Petition for Writ of Certiorari as "(Pet. .....)", to the Appendix thereto as "(Pet. App. .....)", to the Appendix to this brief as "(App. .....)", and to the Record as "(R.....)".

## QUESTIONS PRESENTED

We prefer to restate the questions presented as follows:

1. Whether Or Not The Complaint As Amended Was Defective In The Light Of Applicable State And Federal Decisions.

2. Whether Or Not The Petition For Writ Of Certiorari Was Timely Filed.

## STATEMENT

In his petition (Pet. 5), Brake says the trial court held the Complaint failed to allege actual malice. The trial court made no specific finding and entered an order (Pet. App. 18) granting the Motion to Dismiss which specified numerous grounds for the motion (Pet. App. 19-20).

In his petition (Pet. 11), Brake says the Supreme Court of Florida affirmed the judgment of the lower court. The Supreme Court of Florida denied Brake's Petition for Writ of Certiorari on the ground that it was "without jurisdiction" (Pet. App. 22).

Throughout his petition, Brake discusses at length the nature of the allegations that are necessary to state a cause of action in a Complaint for libel. He scarcely mentions or refers to the three publications upon which his lawsuit was based and includes only one in his Appendix, saying the other exhibits to the Complaint are "not essential to the decision of this cause" (Pet. 10). Because of those omissions, we discuss those publications here.

## The Complaint As Amended

**The August 26, 1962 Editorial.** On August 26, 1962, The Miami Herald published an editorial written by Don Shoemaker, editor of The Herald, entitled "They Should Resign" (App. A1). The editorial was highly critical of five members of the Board of County Commissioners, Dade County, Florida, whose actions in walking out of a commission meeting resulted in the resignation of Irving McNayr, the County Manager.

The editorial said the five commissioners, of whom petitioner was one, had done a disservice to themselves and the community and that they had been out to get McNayr who refused to knuckle under to self-serving politicians. It stated that their political sharp-dealing was hurting the community and that the five should resign.

In Count I of the Complaint, petitioner alleged that the editorial defamed him by stating and implying that petitioner "was engaged in conduct which was unlawful or immoral or of doubtful legality or morality and that plaintiff lacked maturity" (Pet. App. 2).

**The August 28, 1962 Cartoon.** In its August 28, 1962 edition The Miami Herald published a cartoon in conjunction with an editorial that was a follow-up on the earlier editorial (App. A3) and was entitled "The People: Good and Mad" and sub-titled "Their Target: The Romper Boys". The editorial discussed the indignation and outrage of the people of Dade County at the tactics of the five commissioners who maneuvered the County Manager into resigning.

The cartoon that accompanied it depicted the five commissioners dressed in little boys' clothes dodging pots thrown by a woman labeled "Dade Citizens". The car-

toon suggested the commissioners had been trying to grab a pie labeled "Modern Government" from a window sill and that the "Dade Citizens" woman had frustrated them in their attempt.

In Count II, petitioner alleged that the cartoon defamed him because it "implies that plaintiff attempted to steal from the people of Dade County" (Pet. App. 4).

**The August 25, 1964 Editorial.** On August 25, 1964, The Miami Herald published an editorial written by Fred Sherman and entitled "Darrey Davis and Mr. Brake" (App. A5). The editorial came in response to a press release and other literature (App. A7, A9) issued by the petitioner at a press conference he had called (Pet. App. 11), in which he criticized the former County Attorney Darrey Davis for failure to fight the *Dupont Plaza* tax case[1] "with vigor" (App. A5).

Going to Mr. Davis' defense, the editorial recited his repeated warnings to the Metro commission to do something about the county tax roll and his prediction that the roll would be successfully challenged if the commission failed to act. It said that when Mr. Davis replied to Brake's charge and called him a political opportunist, he was too restrained.

The editorial discussed efforts to use the tax assessment crisis that followed the *Dupont Plaza* decision to weaken and wreck the Metropolitan Dade County form of government by the proposed amendments. (The first amendment would have required the County Commission to adopt, after a public hearing, manuals which would thereafter constitute "the standards and methods for as-

1. In *McNayr* v. *State ex rel. Dupont Plaza Center, Inc.*, (Fla. 1964) 166 So. 2d 142, the Supreme Court of Florida affirmed the judgment of the trial court which required that the assessments on the Dade County, Florida tax roll be doubled.

sessment of ad valorem tax rolls for Dade County". The second would have abolished the County Manager's job and substituted a strong mayor and required an election for all seats on the County Commission three months after the amendment became effective [R. 229-235]).

The editorial concluded that the "irresponsible minority" promoting the amendments were not going to wreck Metro by trading on the furor that followed the *Dupont Plaza* decision and suggesting that the passage of the amendments would circumvent the court's order in that case when in fact it would not.

In First Amendment to Count III of Complaint, petitioner alleged that the editorial was defamatory in that

a) "Said editorial impugned Plaintiff's ability and integrity as a lawyer by stating that 'he should know the law,' thus implying that although Plaintiff was a lawyer he did not know the law;"

b) the statement, "The anti-Metro petitions now being circulated promise that the state law on the assessment of real estate will not be enforced. Could anything be more dishonest?", implied "that Plaintiff, as the lawyer-draftsman of the Amendments and the leader of the group circulating the Petitions, was giving false legal information to the general public."

c) the statement, "Where was Bob Brake and what was he doing as a Metro Commissioner to make Dade County comply with the Florida assessment law?" implied "that Plaintiff did nothing as a County Commissioner to bring about a fair, equitable and lawful assessment roll," when in fact he had supported efforts to obtain a fair tax roll (Pet. App. 12-13).

## ARGUMENT

### Introduction

Petitioner discusses at length the requirements for pleading malice under Florida law or actual malice under the decisions of this Court in *New York Times Co.* v. *Sullivan,* (1964) 376 U.S. 254, 84 S.Ct. 710, 11 L. Ed. 2d 686 and those that followed it. In so doing, he infers that those were the only questions the Florida courts considered. This is not so.

Respondents' Motion to Dismiss directed to the Complaint as finally amended claimed the pleadings were defective, inter alia, because petitioner was a public official and a public figure and the Complaint did not allege actual malice, that the parts of the publications referred to were not libelous, and that it appeared from the Complaint that Count III was true or substantially true (Pet. App. 19-20).

In the trial court and in the District Court of Appeal, respondents argued that the Complaint was fatally defective under both Florida case law and the decisions of this Court dealing with the constitutional standard applied to public officials and public figures.

In the District Court of Appeal, Brake argued that the lower court erred in not granting his Motion for Partial Summary Judgment, and respondents argued that the decision of the trial court could also be upheld on the alternative ground that their Motion for Summary Judgment should have been granted (App. A11, A12).

What was and is the main consideration in whether the Complaint states a cause of action is what respondents published about petitioner that he is complaining about.

All the conclusory allegations in the world will not make a libel out of what is not libelous. All of the conclusory allegations in the world will not establish actual malice when the Complaint considered in its entirety shows there was none.

In any event, Petitioner did not file his Petition in this Court within the allowable time, and his attempt to seek review here comes too late.

## POINT I

## WHETHER OR NOT THE COMPLAINT AS AMENDED WAS DEFECTIVE IN THE LIGHT OF APPLICABLE STATE AND FEDERAL DECISIONS

### What the Petitioner Is Complaining About

It is clear that petitioner had to give notice of intent to sue as provided by Chapter 770, Florida Statutes, before he could file suit. That requirement is jurisdictional. *Ross* v. *Gore,* (Fla. 1950) 48 So. 2d 412.

To comply with that statute, petitioner had to designate with particularity in his notice the parts of the publications he claims were false and defamatory. He could not sue later on parts of the articles not set out with particularity in his notice. *Hevey* v. *News-Journal Corporation,* (Fla. App. 1963) 148 So. 2d 543.

On August 27, 1962, petitioner wrote to The Miami Herald and demanded retractions of the following statements in the editorial of August 26, 1962:

1. "This newspaper knows of a certainty that Friday's shady business was long planned by the ringleaders."

2. The conduct of the five commissioners was "petty and childish."

3. They are "proposing to unload all manner of hacks and has-beens on Metro for managerial position." (App. A13)

In a letter to The Miami Herald dated September 17, 1962, petitioner clarified his earlier demand and asserted that the August 26, 1962 editorial falsely claimed that:

1. The first statement above implied that there was a conspiracy and petitioner was a party to it.

2. Petitioner's conduct in causing the lack of a quorum was "petty and childish".

3. Petitioner proposed to unload "hacks and has-beens" on Metro for the managerial position.

In the same letter, petitioner demanded a retraction of the August 28, 1962 cartoon, claiming the cartoon imputed that he had attempted to steal from the people of Dade County (App. A17).

On August 25, 1964, petitioner wrote to The Miami Herald complaining about an editorial that appeared on the same day (App. A21). He asserted that the following statements libeled him:

> "Bob Brake is a lawyer and he should know the law . . . The anti-Metro petitions now being circulated promise that the state law on the assessment of real estate will not be enforced. Could anything be more dishonest?"

He claimed there was nothing in the petitions that promised or implied state law would not be enforced.

> "Where was Bob Brake and what was he doing as a Metro Commissioner to make Dade County comply with the Florida assessment law?"

He said this statement impugned his integrity as a public official by implying he did nothing to bring about a fair tax roll during his term of office.

We are dealing then, with the cartoon and the parts of the articles petitioner designated in his notices of intent to sue.

**Rules of Construction in Interpreting Allegedly Defamatory Statements**

In Florida, as in other jurisdictions, the courts have developed rules and guidelines for construing statements that are alleged to be libelous.

Probably most important of all is to look at the publications complained of to see if they have the connotation ascribed to them in the pleadings. *Hevey* v. *News-Journal Corporation*, supra. If they do not, there is no case, *Ross* v. *Gore*, supra.

The particular language will not be given a tortured interpretation but should be construed as the common mind would understand it. It should not be interpreted by extremes. *Loeb* v. *Geronemus*, (Fla. 1953) 66 So. 2d 241; *Diplomat Electric, Inc.* v. *Westinghouse Electric Supply Co.*, (5th Cir. 1967) 378 F. 2d 377, 381-382.

The entire publication must be considered, including the position of the item in the article, the headline and the display of the article in connection with related publications. *Cooper* v. *Miami Herald Pub. Co.*, (1947) 159 Fla. 296, 31 So. 2d 382.

One test for determining whether an article is libelous is to consider whether the article as published has a different effect on the mind from that which the pleaded truth would have produced. *McCormick* v. *Miami Herald Pub. Co.*, (Fla. App. 1962) 139 So. 2d 197.

Another is to delete from the article the parts complained of to see if the article produces a different effect than it does with the allegedly defamatory portions included. *Hammond* v. *The Times Pub. Co.*, (Fla. App. 1964) 162 So. 2d 681.

Still another and obvious test is that if it appears from the pleadings that the allegedly defamatory matter is true or substantially true, it is not libelous. Inaccuracies not materially affecting the article's meaning are of no consequence. *McCormick* v. *Miami Herald Pub. Co.*, supra. It is for the court to make the initial determination. *Diplomat Electric, Inc.* v. *Westinghouse Electric Supply Co.*, supra.

Here, of course, there is the overriding interpretation of publications coming under the constitutional privilege of *New York Times* and *Curtis Publishing Company* v. *Butts*, (1967) 388 U.S. 130, 87 S.Ct. 1975, 18 L. Ed. 2d 1094.

An application of various of these tests to the parts of the two editorials complained of and to the cartoon shows in each instance that the publicattion is not libelous.

**The August 26, 1962 Editorial**

If we apply the test used in *Hammond* v. *The Times Pub. Co.*, supra, that is, delete the parts of the article complained of, then read the deleted article and see if it leaves the same effect—the August 26, 1962 editorial reads the same way.

As the headline to the editorial ("They Should Resign") suggests, the thrust of the editorial is that the five commissioners who forced the County Manager to resign did so by questionable tactics and should either quit or be forced out of public office.

The editorial describes their acts as "political sharp-dealing" and says they have done a disservice to themselves and to their community. With or without the parts of the editorial, petitioner complains of, its impact is the same.

If we single out the three excerpts from that editorial that petitioner complains about, we reach the same result.

**"Petty and childish."** *In White* v. *Fletcher*, (Fla. 1956) 90 So. 2d 129, the court affirmed a summary judgment for the defendant who had stated that the plaintiff was unfit to be a police officer. The court said:

> "As expressed by Mr. Justice Terrell in Kennett v. Barber, 159 Fla. 81, 31 So. 2d 44, 46, this Court held:
>
> > 'We think the rule is now generally accepted that any one who seeks public employment or public office or who makes his living by dealing with the public or otherwise seeks public patronage, submits his private character to the scrutiny of those whose patronage he implores, and that *they* may determine whether it squares with such a standard of integrity and correct morals as warrants their approval.' (Emphasis added).
>
> "The uniformed policeman, therefore, was certainly subject to fair comment and criticism from any member of the public of the City of Orlando. The generally accepted rule is that 'public officials' or 'public men' are subject to such fair comment."
>
> 90 So. 2d 131.

In the *New York Times* case, this Court said debate should be "uninhibited, robust and wide-open and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials."

Calling the conduct of the five commissioners "petty and childish" falls far short of what is allowable under the Florida law or the *New York Times* case.

**That petitioner was part of a conspiracy.** In his letter of August 27, 1962 (App. A13) petitioner adopts as accurate a Miami Herald article which reported he had had lunch with Hughlan Long, another commissioner. According to the article, Brake advised Long that if Long tried to introduce a resolution at the Commission meeting that afternoon which restricted the County Manager's political activities and any substantial vote was cast for it, that McNayr would resign.

From petitioner's own pleadings, it appears he knew in advance that his fellow commissioner, Long, planned a move that would result in the County Manager's resignation and was trying to enlist support for it, and that Brake and four other Commissioners later walked out of a Commission meeting, thereby precipitating the County Manager's resignation.

From petitioner's own pleadings, it appears that the comment was substantially true. *McCormick* v. *Miami Herald Pub. Co.*, supra.

**"Hacks and has-beens."** Although allegedly seeking review in this Court because of a federal constitutional issue, petitioner argues (Pet. 22) that *Hevey* v. *News-Journal Corporation*, supra, is authority for him here.

We submit the *Hevey* case has been modified by the *New York Times* case. For example, in the *Hevey* case, the court said a high degree of care was required of newspaper publishers to avoid the commission of wrongs in the publication of false articles or news.

Contrast *New York Times* where it was admitted that part of the advertisement was inaccurate and that the

newspaper had in its news files information that would have revealed the errors if a check had been made. This Court said that at most it showed negligence and was insufficient to establish actual malice.

The authority of that decision here where petitioner is admittedly a public official-public figure is doubtful in the light of such decisions as *Pauling* v. *Globe-Democrat Publishing Co.*, (8th Cir. 1966) 362 F. 2d 188, certiorari denied 388 U.S. 909, and *Washington Post Company* v. *Keogh*, (D.C. Cir. 1966) 365 F. 2d 965, certiorari denied 385 U.S. 1011. See also, the 1942 case of *Sweeney* v. *Patterson*, (D.C. Cir.) 128 F. 2d 457, certiorari denied 317 U.S. 678, cited with approval in *New York Times*.

Even if the *Hevey* decision were otherwise controlling, petitioner here failed to allege the actual malice or knowing falsity he admits is required.

In his Complaint, petitioner alleged only:

> "That Defendant knew that the allegations of said editorial were untrue as to Plaintiff *in that* on the preceding day, on Saturday, August 25, 1962, Defendant newspaper carried a story by one GEORGE LARDNER, then the courthouse reporter for Defendant, in which said reporter described a luncheon, attended by said reporter, at which the Resolution complained of in the editorial was discussed and said article shows clearly that Plaintiff did not participate in the drafting of said Resolution and in fact attempted to persuade the author of said Resolution to withdraw it." (Emphasis supplied).

(Pet. App. 2)

If this can be construed as an allegation of knowing falsity, it goes at most to the move to force the County Manager's resignation and not to proposals for his successor. In fact, the 1962 editorial did not even mention a resolution. Petitioner's pleading is a non sequitur.

**The Cartoon of August 28, 1962**

In Paragraph 11 of his Complaint (Pet. App. 4), petitioner alleges that the cartoon that appeared in The Miami Herald on August 28, 1962 implies that he had attempted to steal from the people of Dade County and had engaged in conduct which was unlawful or immoral or of doubtful legality. He claimed the same thing in his letter of September 17, 1962, demanding a retraction (App. A17).

Viewed by ordinary, and not tortured, rules of construction, the cartoon contains no such implication. The cartoon obviously must be construed along with the editorial immediately adjacent to it entitled "The People: Good and Mad" and sub-titled "Their Target: The Romper Boys". The editorial refers to the indignation of the people of Dade County which occurred after a "minority on the Metro Commission jostled County Manager Irving McNayr into resigning."

Interpreting the cartoon as the common mind would understand it, and not by extremes, it is clear that it refers to the angry reaction of the people of Dade County to the action of the five commissioners who maneuvered McNayr into resigning, thereby weakening the concept of Dade County's Home Rule government. Taken literally, the cartoon indicates that the five commissioners had been frustrated in their attempt to deprive Dade County citizens of modern, efficient government by the indignation of the people of the county. There is no suggestion that petitioner or the other four commissioners were stealing or doing anything illegal.

The cartoon criticizes allegorically plaintiff's judgment and his tactics in forcing the County Manager's resignation and as such is not libelous.

If newspapers cannot print cartoons such as this without the threat of libel judgments, the result will be the very "self-censorship" which this Court deplored in *New York Times* (376 U.S. 279).

**The Second Editorial**

As with the first editorial, we submit that the parts of the editorial petitioner complains of could be deleted without changing the overall import or meaning. *Hammond* v. *The Times Pub. Co.*, supra.

The editorial takes petitioner to task for his criticism of Darrey Davis for supposedly mishandling the *Dupont Plaza* tax case as County Attorney. It calls petitioner a "Metro wrecker" and says "political opportunist" is too polite a term for him.

It says the Metro commission had been warned again and again during the time petitioner was a commissioner that the tax roll would be successfully challenged and yet allowed it to happen. It warns that an "irresponsible minority" is trying to use the tax assessment crisis in a misleading way to ruin Metro.

Without the sentences petitioner singles out, the impact is the same.

**"Bob Brake is a lawyer . . ."** In his letter of August 25, 1964, and again in his petition (Pet. 8), petitioner tries to tie the statement "Bob Brake is a lawyer and he should know the law" to the last two paragraphs of the editorial dealing with the petitions. As he interprets the editorial, it reads:

> "Bob Brake is a lawyer and he should know the law. . . . The anti-Metro petitions now being circulated promise that the state law on the assessment of real estate will not be enforced. Could anything be more dishonest?"

Actually, the words appeared in the editorial this way:

> "Bob Brake is a lawyer and he should know the law. Instead of complaining that Darrey Davis didn't oppose the Dupont Plaza suit with enough 'vigor', Mr. Brake should have acknowledged the facts.
>
> "When Bob Brake went on the Metro commission in 1962, the county was on notice to obey the Florida law on assessment. The court had been promised we would obey that law. But two more years were to go by while County Attorney Davis fought tax suits in the courts and pleaded with his own commissioners to achieve a tax roll that would satisfy the law. Over and over again he warned that he could not continue to hold off law suits filed by property owners who were carrying more than their fair share of the county tax load. * * *
>
> "The anti-Metro petitions now being circulated promise that. . . ."

To arrive at the construction he urges on this Court, petitioner deletes almost 300 intervening words. Again, he uses a tortured construction, not the meaning the common mind would give to those words.

A fair reading of the "Bob-Brake-is-a-lawyer" sentence is that instead of complaining about Darrey Davis' handling of the *Dupont Plaza* case, petitioner should have acknowledged that Mr. Davis was faced with an impossible task in defending it. (A conclusion supported also by the excerpts from the trial record included in Exhibit O to First Amendment to Count III of Complaint [R. 240-261].)

Petitioner admittedly did criticize Mr. Davis, saying he did not defend the case with "vigor" (App. A6). He does not contend that the reference in the editorial to Mr. Davis' statement about the inevitability of a success-

ful challenge to the tax roll is false. It appears from the Complaint that the statement is accurate and the comment on it fair. *McCormick* v. *Miami Herald Pub. Co.*, supra.

**"Where was Bob Brake, and what was he doing as a Metro Commissioner?"** Petitioner alleged (Pet. App. 13) the implication of this sentence was that he did nothing to correct an unfair tax roll while he was on the Metropolitan Dade County Commission and was therefore derelict in his duty as a public official. In his First Amendment to Count III of Complaint, Paragraph 18 (i) B, he alleges "he supported every effort to obtain a fair tax roll during his eighteen (18) months as a County Commissioner . . ."

The answer is that respondents had every right to ask what petitioner had done about the tax roll when he was a commissioner. In 1964, after he was out of office, he was holding himself out as an expert on county taxes and sponsoring an amendment to the Metro Charter which would, according to the petition, "Set up a standard covering tax assessments and the method of assessment to be followed." (Exhibit I to the Complaint, R. 229-235).

The decision in the *Dupont Plaza* case certainly indicated that whatever had been done about the county tax roll up until 1964 was inadequate. Yet, petitioner, a former officeholder, sponsored Metro Charter amendments immediately after the court had ordered the assessments on the tax roll doubled. With this much expertise available after the fact, it was most logical to ask what he had done about the problem when he was in office.

Petitioner attempts to answer the rhetorical question in his Complaint (Pet. App. 13) where he alleged he supported all efforts to obtain a fair tax roll including voting

to hire Hunnicutt & Associates and protesting assessment procedures on July 22 and 23, 1963.

We submit that this is a classic example of the situation where the article as published would have had no different effect on the mind than that which the alleged truth would have had. *McCormick* v. *Miami Herald Pub. Co.*, supra. To have included that matter in the editorial would not have changed the meaning or import of the sentence.

We submit it is a classic example, too, of the kind of discussion of public issues and people who by their own activities thrust themselves into the "vortex" that *New York Times* held so essential. The question was not libelous and was germane to the discussion petitioner had begun.

> **"The anti-Metro petitions now being circulated promise that the state law on the assessment of real estate will not be enforced.**
>
> **"Could anything be more dishonest?"**

As set forth above, petitioner tries to tie this language to the "Bob-Brake-is-a-lawyer" sentence several paragraphs above it. This construction is obviously strained and as a matter of law his interpretation cannot be sustained. But the words are not defamatory even if they are not tied to that sentence.

In his Complaint (Pet. App. 12-13), petitioner alleges "that nothing in the said petitions, or any statement made by or under the control of plaintiff, alleged that state law would not be obeyed."

The exhibits attached to the Complaint show that the contrary is true. In other words, the pleadings themselves show that the statements complained of are substantially true.

Petitioner was the author of the press release (Exhibit Q) and called a press conference at his office to announce it. He released it in conjunction with a booklet entitled "The McNayr Testimony" (Exhibit O to the Complaint, R. 240-261) and another press release (Exhibit P to the Complaint, R. 262-264). He claims the purpose was to explain the need for the two charter amendments to the public (Pet. App. 11-12).

"The McNayr Testimony" discussed the "cordial atmosphere of sugary flattery" in which the *Dupont Plaza* case was tried and stated that County Attorney Darrey Davis' comments to the court in that case were "absolutely without foundation" (App. A10). The booklet concluded by accusing the county witnesses and Mr. Davis of either complete stupidity or complete chicanery. It stated:

> "On the other hand the spurious testimony may have been deliberately contrived. What reasonable motives could justify the degrading of a circuit court of the State with lies is difficult to conceive."

Petitioner's own press release was slightly more restrained but still dealt principally with the *Dupont Plaza* tax case and was highly critical of Mr. Davis and all the county officials involved in that case.

It is significant that these three pieces of literature which petitioner alleges were distributed to explain the need for the charter amendments do not really explain what the proposed amendments would accomplish. They were designed to trade upon the furor that followed the decision in the *Dupont Plaza* case. While none of this campaign literature expressly says the *Dupont Plaza* decision would be nullified if the Metro Charter were amended, that is the clear implication.

When petitioner says that the petitions themselves do not promise that the state law on assessment will not be obeyed, he is correct. But the petitions and the campaign propaganda that went with them clearly conveyed that impression, and were so understood at that time in Dade County (See Exhibit J to the Complaint, R. 236).

Returning then to the standards for interpreting allegedly libelous language, this is another instance where there is no difference in effect between the language as printed and the actual fact. Petitioner says the editorial is false when it says, "The anti-Metro petitions now being circulated promise . . .". We say that it would have been entirely accurate to say "The propaganda circulated by those sponsoring the anti-Metro petitions promises . . ." and that there is no real difference between the two.

Petitioner's argument that he had no opportunity to rebut what was published about him in the second editorial (Pet. 23) simply does not fit the facts. That editorial was in response to petitioner's unrestrained public attack on the former County Attorney.

As such, petitioner comes squarely within the holding in *Pearson* v. *Fairbanks Publishing Co.*, (Alaska 1966) 413 P. 2d 711. See also, Bertelsman, "Libel And Public Men," 52 American Bar Association Journal 661-662 (1966).

## POINT II

## WHETHER OR NOT THE PETITION FOR WRIT OF CERTIORARI WAS TIMELY FILED

Petitioner prays for a Writ of Certiorari to review the judgment of the Supreme Court of Florida and of the District Court of Appeal of Florida, Third District (Pet. 1).

The Supreme Court of Florida did not enter a judgment. On July 8, 1968, it denied Brake's Petition for Writ of Certiorari, not on discretionary grounds, but because it was "without jurisdiction" (Pet. App. 22). Thus, the only review petitioner can seek is a review of the decision of the District Court of Appeal "the highest court of a state in which decision could be had". 28 U.S.C. § 1257(3); *Nash* v. *Florida Industrial Commission*, (1967) 389 U.S. 235, 88 S.Ct. 362, 19 L. Ed. 2d 438; *Randall* v. *Board of Commissioners*, (1923) 261 U.S. 252, 43 S.Ct. 252, 67 L. Ed. 637.

His attempt to seek such review comes too late. The opinion of the District Court of Appeal was filed on March 19, 1968. There was no timely petition for re-hearing, and the mandate of the court was issued on April 4, 1968.

The Petition for Writ of Certiorari was filed in this Court on August 28, 1968, 162 days from the date of the opinion, and 146 days from the date of the mandate of the District Court of Appeal.

Title 28, U.S.C., Section 2101(c) provides that the writ may be applied for within ninety (90) days but that for good cause the time for filing a petition may be extended for an additional sixty (60) days. No such extension was requested by petitioner.

Brake was not forced to choose between seeking review either in the Supreme Court of Florida or in this Court. He could have done both by requesting an extension of time within the original ninety-day period.

## CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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By .....

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Brief In Opposition To Petition For Writ Of Certiorari was served by mail upon ROBERT M. BRAKE, ESQ., Petitioner, 1830 Ponce de Leon Boulevard, Coral Gables, Florida, this 25th day of September, 1968.

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*Of Counsel*